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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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No. 237

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ROSS ENGINEERING COMPANY, INCORPORATED,  
A CORPORATION,

*Petitioner,*

*vs.*

THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS AND BRIEF IN SUPPORT  
THEREOF.

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*Counsel for Petitioner.*

M. WALTON HENDRY,  
*Of Counsel.*



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COURT OF CLAIMS

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Bernard J. Gallagher, on behalf of the petitioner, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States entered in the above-entitled case on February 5, 1945.

**Opinions Below**

The opinions of the Court of Claims (R. 19) are not yet officially reported.

**Jurisdiction**

Judgment in the Court of Claims was entered February 5, 1945 (R. 33), and petitioner's motion for new trial was overruled May 7, 1945 (R. 33). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

### **Questions Presented**

(1) Whether the respondent, having bound itself by an unqualified contract to erect and furnish to the petitioner, by certain dates, foundations upon which petitioner was required to erect the superstructures, was guilty of a breach of contract by not completing the foundations by the agreed dates.

(2) Whether the respondent is liable in damages to petitioner for its failure to complete the foundations by the dates specified.

### **Contract Provisions Involved**

The contract provisions involved are set forth in the appendix, *infra*, p. 20.

### **Statement**

The petitioner, Ross Engineering Company, Inc., entered into a contract with the United States on September 3, 1938 to construct a 250-man barracks for the Government at Fort Niagara, New York. It sued the Government in the Court of Claims for damages for breach of contract, the breach being the failure of the Government to complete and turn over to the petitioner on the dates specified in the contract the foundations upon which the petitioner was to build the superstructure on the barracks. The petitioner claimed that because of this delay on the part of the Government, petitioner was forced to carry on during the winter months work which it could have but for the delay completed before winter, and that the winter work required the use of more materials and the expenditure of more money for labor than it would have required if the work had been done before winter.

The Government, on August 15, 1938, issued its invitations for bids on this job. The invitation included the speci-

fications for the proposed superstructures and in Addendum No. 1 to the specifications, which addendum is quoted by the Court below in finding 2 (R. 20), it is stated that the Government would complete the foundations and clear the site of the north wing by September 5, of the connecting bay by September 20, and of the south wing by September 30 (R. 20). The Court below further found it to be a fact as shown in findings 10 and 12, R. 24 and 25, that the three foundations were not completed and the sites cleared until 15, 27, and 40 days, respectively, after the dates stated in the invitation to bids and in addendum No. 1 (R. 30).

The Court below further found it to be a fact, finding 4, R. 21 and R. 29 and 30, that in working up the figures for the petitioner's bid on the job, petitioner proceeded on the theory that the statements of the Government with respect to the dates for the completion of the foundations would be fulfilled and that before the setting in of cold and bad weather which the contractor knew from past experience in that territory would be about the middle of December, the petitioner could complete all the concrete work of the entire frame and floor slabs, and by running up the brick walls could enclose the north half of the building and thus be able to do a large amount of the inside work during the winter months. The Court below further found it to be a fact that such a theory was practical and could have been accomplished by petitioner if the respondent had completed the foundations on the dates stated in addendum No. 1 (R. 21 and 29). The Court below found that the delay of the respondent in completing the foundations prevented petitioner from finishing the concrete work before cold weather set in about December 15, 1938, and that the additional cost and expense that resulted from the doing of the concrete work during the winter weather between December 15, 1938 and March 31, 1939 over what it would

have cost had that work been done prior to winter weather, were as follows:

Tarpaulins \$244.25, and salamanders \$494.61, for protection of concrete from frost .....	\$738.86
Heating concrete .....	124.68
Extra cement in concrete .....	439.56
Removal of snow .....	251.78
Labor on winter protection .....	1,188.76
Additional cost of labor for concrete and form work during cold weather .....	7,739.46
Overhead for 35 days' delay .....	111.26
<b>Total .....</b>	<b>\$10,594.36</b>
(R. 28.)	

The Court below, however, denied petitioner's right to recover for these damages on the ground that after the bids were opened, the petitioner learned from one of its employees that the completion of the foundations would probably be delayed beyond the dates specified because the respondent's workmen had run into an underground spring in building the foundations and the supervisors could not work the WPA labor more than a limited number of hours per week, as a result of which the foundations would probably not be ready to receive the superstructures for from two to four months. There was no finding made by the Court below that the respondent at any time informed petitioner or any of its agents or employees that the foundations would not be completed by the dates specified in Addendum No. 1 of the specifications.

#### **Specifications of Errors to Be Urged**

The Court of Claims erred:

(1) In not holding that the respondent was bound as a matter of contract to complete the foundations by the dates stated in Addendum No. 1 to the specifications.

(2) In holding as a matter of law that any information, expectation or belief that the petitioner had at the time of entering into the contract that the foundations might not be completed on the dates named in the contract, relieved the respondent of its contract obligations to complete the foundations by the dates named in the contract.

(3) In holding that the question of misrepresentation or warranty is relevant to the issue.

(4) In holding that because neither party had any expectation that the foundations would be ready on the dates named in the contract at the time petitioner's bid was made and accepted, "the dates set in the specifications for the completion of the foundations passed completely outside the contemplation of the contract."

(5) In not holding that petitioner was entitled to damages incurred by reason of the failure of the respondent to complete the foundations on the dates specified in Addendum No. 1 to the specifications.

(6) In failing to render judgment in favor of petitioner in the sum of \$10,594.36.

(7) In dismissing the petition and entering judgment for respondents.

(8) In overruling petitioner's motion for new trial.

### **Reasons for Granting the Writ**

It is a matter of common knowledge that the Government annually enters into a vast number of contracts which contain similar provisions to the contracts in suit, which obligate the Government to perform certain acts as part of the consideration for the contract. The decision of the Court of Claims in the instant case is contrary to the many decisions of that Court as well as to the decisions of this

Court in not recognizing the well-known rule of law that when the Government enters into a contract with individuals, it is bound by the same rules and regulations as govern contracts between private parties. *Perry v. U. S.*, 294 U. S. 330; *State Bank v. U. S.*, 96 U. S. 30; *Gilbert, et al. v. U. S.*, 1 C. Cls. 28 (affirmed 8 Wall., 358); *Lyons v. U. S.*, 30 C. Cls. 352; *Southern Pa. R. R. v. U. S.*, 28 C. Cls. 77. If the Government is allowed to escape liability for damages suffered for its failure to perform its contract, and for its breach of contract, on the ground that the contractor had some information which might lead him to believe that the Government would not perform the obligations stated in the contract, then no Government contract would be worth the paper it is written on. It is also common knowledge that Government contracts are drawn by the Government and that contractors merely execute the same, so that if the terms of the written contract are not satisfactory to the Government, it is plainly the fault of the Government and not the contractor, and the remedy in such a case is to draw the contract in such terms as is satisfactory to the Government. (*American Surety Company v. The United States.*) (322 U. S. 96).

The question involved in this case, therefore, is of tantamount importance, since the decision of the Court below in the instant case appears to be a total reversal of the many decisions of this Court on the question as to whether or not the Government, when entering into an unqualified undertaking, is bound by the same law as governs Government contracts between individuals.

### **The Law**

#### **ERROR OF LAW NUMBER (1)**

Petitioner submits that the Court below erred in not holding that the respondent was bound as a matter of contract

to complete the foundations by the date stated in addendum No. (1) to the specifications. It will be noted that subparagraph (a) of addendum Number (1) states that:

"the foundation of the north wing \* \* \* will be completed and site cleared so that the successful bidder can start work Sept. 5, 1938, without interference"; that subparagraph (b) of addendum No. (1) states "the foundation of the connecting bay \* \* \* will be completed and cleared on or before Sept. 20, 1938"; that subparagraph (c) of addendum No. (1) states "the foundation of the south wing will be completed and cleared on or before Sept. 30, 1938." (R. 20)

There is no question whatsoever but that the above-mentioned addendum No. (1) of the specifications is a part of the contract. The respondent's undertaking to complete the foundations by the dates named is unqualified by any contingency whatever. The law is that when any party to a contract enters into "an unqualified undertaking," as the Government did in this case, he must perform or pay damages to the other party. There is no exception whatever to this well-known rule of law. In the case of *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 14, Justice Jackson of the Supreme Court said:

"There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor."

In the case of *Dermott v. Jones*, 69 U. S. 1, 7, the Supreme Court, speaking through Justice Swayne, said:

"In that instrument the defendant in error (the promisor) made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him."

Elliott, on contracts, laid down the rule as follows:

"Sec. 1892. *Impossibility by an act of God.*—\* \* \* The general rule is that, where an obligation or a duty is imposed upon a person by law, he will be absolved from liability for nonperformance of the obligation if such nonperformance was occasioned by an act of God; but when one undertakes by an express contract to do a given act, *he is not* absolved from liability for nonperformance, even though he is prevented from doing the same *by an act of God*. In the latter class of cases, if a person desires to absolve himself from liability for nonperformance under any circumstances he should so stipulate in his contract." 3 *Elliott on Contracts*, sec. 1892.

The respondent, in the instant case, made an unqualified undertaking that the foundations in question would be completed by the date stated. The Government itself drew this contract and it could have provided therein for the events which prevented it from performing its contract by the dates named, but it did not do so. The respondent knew they were going to use W. P. A. labor, and they knew of the spring. If delay in completing foundations was to be excused because of these things, it would have been a simple matter for the Government to insert such a reservation in addendum No. (1), but it failed to do so. It failed utterly to make any provision whatsoever for any contingency that might

arise, but by "an unqualified undertaking," contracted to complete the foundations by the dates stated. Therefore, in accordance with the decision of the Supreme Court, the respondent was bound to either complete the foundations by the dates stated, or to pay the damages for failure to do so.

It will be noted that the case of *Dermott v. Jones*, above referred to, is identical. In that case, the Supreme Court stated again "against the hardship of the case, he might have guarded by a provision in the contract. Not having done so, it is not in the power of this Court to relieve him." Nor can the Court below in this case relieve the respondent for its failure to complete the foundations by the dates specifically and unqualifiedly stated in the contract, or relieve respondent from paying the damages suffered by the petitioner.

It will be further noted that Elliott, a well-known authority on contract law, states that even an Act of God would not relieve a party from performing an unqualified contract obligation unless the contract in such a case so stipulates.

#### ERROR OF LAW NUMBER (2)

Petitioner further submits that the Court below erred in holding as a matter of law that any information, expectation, or belief, that the petitioner had, either prior to submitting its bid or thereafter, that the foundations would not be completed on the dates named in the contract, would relieve the respondent of its contract obligation to complete the foundations by the dates it was required by the contract to complete them.

It will be noted from the excerpt from the decisions of the Supreme Court and authorities, *supra*, that there is no exception to the rule that a party must either perform an unqualified undertaking or else pay the damages, unless

the contract provides against the event which prevented performance. The Supreme Court does not state that this rule is contingent upon the other party having information, expectation, or belief that the party bound would not perform its unqualified contract obligation. Manifestly, the reason for this is that the offended party, in this case the petitioner, could not possibly know as a *fact* that the foundations would not be completed by the respondent within the time stated in the contract. He could only believe or infer from the condition in which Kurtz saw the foundations that they might not be completed within the time required. He could not know as a fact that the foundations would not be ready on the agreed dates *until the time had expired*, unless the respondent had so informed him in advance. No such information was ever given by respondent to petitioner. On the contrary, the contract in unqualified terms notified the petitioner that the foundations would be completed by the dates named. The law provides, as hereinbefore shown, that a party making an "unqualified undertaking," in the absence of some saving clause in the contract, must either perform by the dates named, or pay the damages. It is elementary that the respondent, as well as the petitioner, is charged with knowledge of the obligation imposed on it by law.

Petitioner knew that it was possible for respondent to complete the foundations by the dates named if they put on a sufficient number of men and machines. It is a matter of common knowledge that contractors build great camps, ships, airfields, and other enormous construction projects in very short periods of time. The construction of these foundations was a comparatively small job, which the respondent could easily have performed by the agreed dates if they had the will to do it. The respondent never has contended in this case that it was impossible for them to carry out their undertaking.

In the case of *George W. Jones v. United States*, 96 U. S. 24, Justice Clifford, speaking for the Court, stated:

"Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control."

In the case of *The Harriman v. Emerick*, 76 U. S. 161, 172, the Supreme Court, speaking through Justice Clifford, stated:

"If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an Act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine v. Jane*, and that the covenantor was liable for the breach of his agreement. *Beebe v. Johnson*, 19 Wend., 500. If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain tomorrow, the contract will be upheld and enforced. Comyn, Digest, 96; Rolle, 420, 1.20."

In the case of *Carnegie Steel Co. v. United States*, 240 U. S. 156, the Supreme Court, speaking through Justice McKenna, stated, page 165:

"But even if this cannot be asserted, the case falls within *The Harriman, supra*, where it is said that the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be affected. Nothing short of this will excuse nonperformance."

"And it was held in *Sun Printing & Pub. Assoc. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, that 'It was a well-settled rule of law that if a party by his contract charged himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.' Cases 60 L. ed."

Therefore, even if petitioner had reasons to expect that the foundations would not be completed by the date stated, it did not know that this assumption was correct. However, it did know it was possible for respondent to complete the foundations by the dates stated. The law gives the petitioner the right to rely upon the unqualified undertaking of the respondent that the foundations would be completed on the dates stated.

The Court, below, therefore, is in error in holding that the respondent was relieved of its unqualified obligation. The Supreme Court has so held in the cases cited, saying that the only relief available to the respondent in such a case is a saving provision in the contract.

#### ERROR OF LAW NUMBER (3)

Petitioner submits that the Court below erred in holding that the question of misrepresentation or warranty is relevant to the issue. The question involved here is neither one of misrepresentation nor one of warranty. It is a question purely and simply of a contract obligation to complete

these foundations by the dates specified in the contract. Petitioner does not even allege it was misled or that there was any misrepresentation, nor does it claim that there was any warranty. What the petitioner does claim is that the respondent entered into an unqualified contract obligation which the Supreme Court stated bound the respondent either to perform, or pay the damages.

#### ERROR OF LAW NUMBER (4)

The Court below erred as a matter of law in holding (R. 32-33), that because neither party had any expectation that the foundations would be ready on the dates named in the contract at the time petitioner's modified bid was made and accepted, "the dates set in the specifications for the completion of the foundations passed completely outside the contemplation of the contract." The modified bid referred to by the Court below, was the offer of the petitioner to reduce his original bid time for completing the work from 550 days to 300 days. (Rec. 22, finding 6.)

Neither the modified offer nor the acceptance thereof eliminated the dates set in the specifications for the completion of the foundations. The modified offer and acceptance was made prior to the execution of the formal contract. When the formal contract was executed, it included the unqualified undertaking of the respondent to complete the foundations by the dates stated in addendum Number (1).

The court below states that at the time this modified offer was made and accepted, neither party expected that the respondent would complete the foundations by the dates named in the contract. As far as respondent is concerned, this statement is obviously incorrect because the respondent said in so many words in their formal signed contract that they would have the foundations ready by the agreed

dates. There is no finding by the Court in this case that the Government ever informed the petitioner that it did not expect to, or would not, complete the foundations by the dates named. On the contrary, the respondent specifically stipulated that it would complete them by the dates named.

If, as the Court below states, the respondent had no expectation of completing the foundations by the dates named in addendum No. (1), was it not the clear duty of the respondent at the time the modified offer was accepted, or certainly at the time of signing the formal contract, to so inform the petitioner instead of notifying the petitioner in plain words by addendum No. (1) that it would complete the foundations by the dates stated? Did the respondent have no obligations whatsoever to inform petitioner that it never expected to carry out the terms of the contract which it signed? The respondent is clearly chargeable with knowledge of the law and the law is, as we have herein shown, that a party to a contract entering into an "unqualified undertaking" is bound either to perform in accordance with its undertaking, or pay the damages.

The Court below has relieved the respondent of its obligations under this contract on the ground that the petitioner did not expect the foundations to be completed by the dates named, and at the time of making its modified bid, did not protest to respondent that the foundations were not further along at that time. In doing this, the Court below totally disregarded the contract obligation of the respondent to complete the foundations by the dates named, or pay the damages, and that this obligation was possible of performance. Furthermore, the Court below ignores the important fact that the petitioner could not be charged with knowledge that the foundations would not be completed by the dates named, but could only infer from the conditions of the foundations that they might not be completed by the

dates named, whereas the respondent must have known what it intended to do and what it could do.

Since petitioner had a perfect legal right, as we have herein shown, to rely upon the respondent's unqualified undertaking to complete the foundations by the dates stated, it was entirely unnecessary for petitioner to protest that the foundations had not progressed further at the time of submitting its modified bid, or entering into the contract. However, if there was an obligation on the part of the petitioner to protest at the time of making its modified offer, there was certainly a greater legal obligation on the part of the respondent to notify the petitioner that it did not expect or intend to perform the contract which it was entering into, particularly since respondent had knowledge of essential facts not known to petitioner. If the respondent had done this instead of entering into a contract, whereby it agreed without any qualification whatsoever that it would complete the foundations by the dates stated, this case would not be in Court, as unquestionably, in such a case, the petitioner would have refused to sign the contract and could properly have refused to do so, since bids were submitted upon the representation by the respondent in the specifications that the foundations would be completed by the dates stated.

Since the respondent did not inform the petitioner that it did not intend to carry out its contract obligation, but on the contrary, entered into a contract by which it undertook to perform by the dates stated, it is clear that the Court below is in error in concluding that the respondent did not expect to complete the foundations by the dates named. Otherwise, the respondent would certainly have so informed the petitioner, and would not have entered into such a contract. Therefore, we submit that the Court below is clearly in error in stating that both parties never expected the foundations to be completed by the dates named, since the

facts per se show that the respondent never had any such expectation, and the fact that the petitioner may have inferred that the foundations would not be completed by the dates named from what it saw of their condition, plainly under the law, as stated by the Supreme Court in the cases cited herein, does not relieve the respondent of its unqualified contract undertaking, either to perform or pay the damages.

In order to reach the conclusion which the Court below has done in the instant case, it is necessary to totally disregard this stipulation in the contract. We submit that the Court below has no power to do this. In the case of *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, the Supreme Court stated:

“Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, *even though the intention of the party drawing the contract may have been different from that expressed.* A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. Clark, Contracts, p. 593.”

The construction given to this contract by the Court totally disregards the contract provision, which required the defendant to complete the foundations by the dates named, since the Court states that this provision of the contract “passed completely outside the contemplation of the contract” because when the parties signed the contract they didn’t expect to carry out this provision. In other

words, the Court in giving a construction to this contract concludes that the intent of the parties was contrary to and in total disregard of the plain and unambiguous language of the contract. This the Court below has no power to do, for, by so doing, it would be making a contract for the parties in violation of the well-known rule laid down by the Supreme Court in *Calderon v. Atlas, supra*.

It is plain, therefore, that if the parties did not intend or expect to complete the foundations by the dates named in the specifications, then the only remedy was to eliminate that provision from the contract before it was executed. If the party to be charged can escape liability under a contract because that party did not expect to perform the contract at the time it was executed, no contract would be worth the paper it is written on.

In the recent decision of the Supreme Court in the case of *American Surety Co. v. United States, supra*, the Court said:

"\* \* \* but we are confronted here with an unambiguous contract \* \* \* Since we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, the judgment below must be affirmed."

This decision of the Supreme Court was followed by this Court below in the *National Surety Corporation* case, No. 45797, decided December 4, 1944. This case is in conformity with all the Supreme Court cases and authorities cited herein.

It is a curious conclusion that the Court below has reached in deciding that the respondent is not bound by the facts of which it had knowledge, while the petitioner is bound. It is even more curious that the Court below relieved the respondent of its unqualified obligation to build the foundations by certain specified dates, which unqualified obliga-

tion the respondent itself deliberately entered into after it had full knowledge of all the facts. No one knew better than the respondent itself what its plans were with respect to building the foundations, or what difficulties they might encounter by the use of W. P. A. labor. It is a strange proposition of law that the Court below should hold that either party is not bound by the contract they make when they enter into it with full knowledge of the facts. It is a one-sided doctrine that holds the petitioner and not the respondent.

If the party to be bound, in this case the respondent, can be released from his unqualified undertakings in a contract, which he entered into with full knowledge of the facts, then there would be no point in making a written contract.

In all the decisions of the Supreme Court herein cited, they hold that the party to be bound cannot be released from an unqualified undertaking in a contract, except by a specific reservation in the contract itself, and there was no such reservation in this contract. Therefore, the Court's decision in this case is in direct conflict with all the Supreme Court cases cited herein.

#### ERROR OF LAW NUMBER (5)

The Court below erred in not holding that the respondent was bound as a matter of contract to complete the foundations by the dates stated in Addendum No. 1 to the specifications.

#### ERROR OF LAW NUMBER (6)

The Court below erred in not holding that petitioner was entitled to damages incurred by reason of the failure of the respondent to complete the foundations on the dates specified in Addendum Number (1) to the specifications.

ERROR OF LAW NUMBER (7)

The Court below erred in failing to render judgment in favor of petitioner in the sum of \$10,594.36.

ERROR OF LAW NUMBER (8)

The Court below erred in dismissing the petition and entering judgment for respondents.

ERROR OF LAW NUMBER (9)

The Court below erred in overruling petitioner's motion for a new trial.

Respectfully submitted,

BERNARD J. GALLAGHER.

M. WALTON HENDRY,  
*Of Counsel.*